In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 1654

WYMAN HULAN PARR,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

G. H. KELSOE, JR.,
858 Mercantile Dallas Bldg.,
Dallas, Texas,
Counsel for Petitioner.

WARLICK LAW INC —1207 HORD STREET—DALLAS—RI 1-6711

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Wyman Hulan Parr prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled and numbered cause on May 12, 1958, and which became final on June 11, 1958, on denial of motion for rehearing. Said judgment is printed as appendix to this petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *30 F. 2d* (unreported to date), as well as an appendix to this petition. The opinion of the United States District Court, Northern District of Texas, Dallas Division, is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under *28 U. S. C., Section 1254, Rule 19 of United States Supreme Court.* The decision of the Court of Appeals on the Federal constitutional questions involved in this cause is of great importance to the public and such decision is of such a nature as to impair the constitutional rights of every citizen of the United States. Further, said decision is contrary to the decision of this Honorable Court in Cause No. 549, *Veto Giordenello v. United States of America*, opinion rendered June 30, 1958, and as yet unreported.

QUESTIONS PRESENTED

1. Under *Amendment 4 to the Constitution of the United States* and *Rule 41(e) of the Federal Rules of Criminal Procedure*, is Petitioner an aggrieved party to an illegal search and seizure when he is one-half owner of the real estate and the house searched, is entitled to immediate possession of said real estate and house searched by virtue of the lease agreement being in default, and holds a lien on the property seized through the illegal search and seizure by virtue of Texas statutory law?

2. Can the conviction of Petitioner be upheld when the Respondent was allowed to exhibit to the jury lewd and obscene films over the objection of Petitioner, when Petitioner offered to stipulate the same were lewd and obscene, when the effect of said film deprived Petitioner of a fair and impartial trial and due process of law as guaranteed him by the Constitution of the United States, Amendments 5 and 14 thereof?

3. Where Petitioner was indicted solely under the conspiracy statute of the United States, *Title 18, U. S. C., Section 371*, and the Court charges on the law of principal over objection of Petitioner, does said charge not give the jury a means of convicting the Petitioner of an offense for which he was not indicted, contrary to Amendment 5 to the Constitution of the United States?

STATUTES INVOLVED

The pertinent statutory provisions as cited herein are printed in Appendix B, infra, page 43.

REASONS FOR GRANTING WRIT

1. Under Amendment 4 to the Constitution of the United States and Rule 41(e) of the Federal Rules of Criminal Procedure, is Petitioner an aggrieved party to an illegal search and seizure when he is one-half owner of the real estate and the house searched, is entitled to immediate possession of said real estate and house searched by virtue of the lease agreement being in default, and

holds a lien on the property seized through the illegal search and seizure by virtue of Texas statutory law?

The search warrant as shown in the Transcript of Record and affidavit therefor are insufficient and invalid as matters of law for each of the following reasons:

(a) It is shown that the search warrant is made on information and belief from oral admissions made by Bob Bly to special agents of Federal Bureau of Investigation. This is insufficient to show probable cause for the issuance of a search warrant *as the said Bob Bly did not make an affidavit before the Commissioner who issued the search warrant nor does the affidavit show that the said Bob Bly made said oral admissions to the affiant, thus hearsay,* nor is it shown that George Robert Bly and Bob Bly are one and the same; thus, for each of these reasons, the said affivadit for search warrant is defective and invalid.

(b) The search warrant is invalid and defective in that it is directed to "The U. S. Marshall, or any authorized Peace Officer." Yet the said warrant shows to have been executed by one William A. Murphy, special agent in charge, F. B. I., Dallas, when Rule 41 of the Rules of Civil Procedure expressly provides that the search warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof.

(c) The said warrant is further invalid and defective in that the warrant must be executed and re-

turned within ten days after its date and shall be verified by the officer making the return; whereas the return herein is undated, thus improper verification; further, the inventory is improper.

To support the defectiveness and invalidity of the search warrant's affidavit under reason (a) above the following authorities are cited:

In *Davis v. United States, Fifth Circuit, 35 F. 2d 957*, it was held as follows:

> "The search warrant could not be based on the statement of Walker or the affidavit of Proctor because neither of them appeared before the Commissioner. Its validity, therefore, depends solely upon the affidavit of the trustee. But the trustee did not make an affidavit based upon his own knowledge; on the contrary, his affidavit was based wholly on the statement of others, and consequently, was hearsay."

In *Flynn v. United States, 36 F. 2d 891*, it was held:

> "In the affidavit, upon which the warrant issued, after describing the premises occupied by Flynn at Hancock Pond, the affiant, Maurice W. Greenlaw, a Federal Prohibition Agent, averred that 'on the first day of Sept., 1928, one Frank St. Louis sold to one Ned Danforth in and upon said premises, certain intoxicating liquors, to-wit, twelve bottles of gin.' It was not averred that the affiant, Greenlaw, had personal knowledge of the alleged sale, and facts were not stated showing that he had reasonable grounds to believe that the fact averred, the sale, was true; and the warrant simply contained a recital of what was stated in the affidavit. This being the situation, the affidavit was defective and insufficient on its face to justify the issuance of a search warrant; and the search war-

rant was likewise on its face defective and invalid. Nothing was submitted to the commissioner upon which he could find probable cause for issuing the warrant."

In *Rose v. United States, 45 F. 2d 459*, it was stated:

"Tested by these principles, the evidence produced as the foundation for the issuance of the search warrant in the case at bar falls far short of meeting the requirements. The only person appearing before the United States Commissioner was Splawn, and he had no personal knowledge of the facts: all he had was a belief based upon the affidavit of Kazakes which he produced. The testimony of Splawn was therefore clearly hearsay, and the commissioner was not authorized to act upon it. Neither was the affidavit of Kazakes such evidence as would authorize the commissioner to issue a search warrant. * * * There was no showing who he was; nor that he was mentally competent to make an affidavit. * * * The United States Commissioner, in hearing the application for a search warrant, acts in a quasi judicial capacity. He is the one to pass upon their credibility. He can do this only if the witnesses are produced before him. For the foregoing reasons, we think there was no legal, sufficient evidence before the United States Commissioner as a basis for issuing the search warrant; * * *."

In *Schencks v. United States, 2 F. 2d 185*, the court held the affidavit of a police officer stating facts on information and belief insufficient as violating Amendment Four to the United States Constitution, said opinion providing in part as follows:

"The federal courts have most jealously guarded the rights secured to the people under that amendment and have uniformly held that its purpose cannot be evaded

by the issuance of writs on sworn declarations which would permit the person or persons making them to escape responsibility therefor. A sworn statement that a person is informed and believes, or has reason to believe and does believe, that certain facts exist, is not a positive statement that they do exist, or that they are true, and leaves no one responsible for a search or seizure, in case the information of the affiant or deponent should prove to be incorrect, or in case there should be no sound basis for his belief. If the Peace Officer has reason to believe, and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which lead him to that conclusion, and which were known to him of his own knowledge. If he has no first hand information as to the material facts, but has been informed by another as to the facts or conditions which would justify the issuance of processes for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statements made by him to the officer * * * to permit them to search for evidence because they deposed that they had reason to believe and did believe that the law had been broken, or because they deposed that they were informed and believed that certain facts existed would leave the home, the property and the person of the citizen at the mercy of mere suspicion and of misstatements and misinformation for which no one could be held accountable."

To support the defectiveness and invalidity of the search warrant as addressed to U .S. Marshal or authorized Peace Officer under reason (b) above, the following authorities are cited:

In *Leonard v. United States, 6 F. 2d 353,* it is held essential to the validity of a search warrant that it be directed to an officer or class of officer any one of whom is authorized to execute it. *Rule 41* of the *Rules of Criminal Procedure* provides that the warrant shall be *directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof.* The fact that there was no United States Marshal executing this warrant is apparent from the record in this cause, thus the balance of the directive, "or any authorized Peace Officer," clearly does not comply with the laws of the United States, the *Constitution*, or *Rule 41 of the Rules of Criminal Procedure.*

William A. Murphy testified that he executed the warrant, yet, as a matter of law, he is not an authorized Peace Officer as that term is defined and commonly understood. See "Words and Phrases—Peace Officer." *Further, the warrant is invalid and defective because the rules do not authorize the issuance of a warrant to authorized Peace Officers but only to Civil Officers of the United States.*

In *United States v. Smith, 16 F. 2d 788,* the search warrant was directed to J. H. Lee, Internal Revenue Officer of the United States for the Southern District of Florida, or to his Deputies or either of them, and to
Federal Prohibition Agent, and his deputies or any or either of them. The return was made by and the warrant was executed by James C. Bean, Prohibition Agent. It is contended that the warrant is invalid as there is no such

officer as a deputy to an Internal Revenue Officer or to a Federal Prohibition Officer, the court stating in its opinion as follows:

> "Section 6 requires the commissioner to issue the warrant upon probable cause. It must be signed by him, and addressed to 'a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States. * * *.' * * * The direction in a search warrant is an essential part of the warrant, and must be addressed to a civil officer of the United States authorized to enforce the laws thereof, or to a person so duly authorized by the President of the United States, and it must be possible to definitely determine within the four corners of the instrument itself just what officer or officers are directed to serve same, * * *. It is not necessary that the officer or officers to whom a search warrant is directed be mentioned by name. The warrant may be directed to a class or to several classes of persons, as to 'the United States Marshal for the district of Rhode Island, or any of his deputies, or any federal prohibition agent, or any civil officer of the United States, duly authorized to enforce any law thereof,' Gandreau v. United States (C. C. A.), 300 F. 21. It must, however, be served by someone identified as included in one of the classes named in the direction of the warrant. * * * Now, it is true that these statutes give authority to make searches and seizures, but they must be construed strictly [Giles v. United States (C. C. A.) 284 F. 208], and I find absolutely nothing in this warrant to justify me in saying that Prohibition Agent Bean, who made this return, had any authority under the direction in the warrant to execute it. * * *."

See also *United States v. Kohlman, 51 F. 2d 313*, and *Perry v. United States, 14 F. 2d 88.*

To support the defectiveness and invalidity of the search warrant under reason (c) above, the following authorities are cited:

Rule 41D of the Rules of Criminal Procedure provides in part as follows:

> "The warrant may be executed and returned only within ten days after its date. * * * The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer."

When the return and inventory are checked against the requirements of this rule, it is clear that the *return is undated*, thus failing to comply with the rule that the same *be returned only within ten days*. It is further clear that the applicant for the warrant was not present at time of the making of inventory.

In *Poldo v. United States*, *55 F. 2d 866, 868*, it is held:

> "The authorities are clear that the affidavit must be self-sufficient, and cannot be bolstered up by oral testimony. In United States v. Casino, supra, Judge Learned Hand said: 'For a similar reason it is not material that the other evidence is absent, which was before the commissioner and which may have induced him to deny quashal of the warrant. While under section 16 he must decide after hearing whether on all

> the facts there were reasonable grounds for the warrant, that does not dispense with the necessity for allegations in the affidavits themselves, which, if true, show a self-subsisting ground for the issuance of the warrant. * * * In this respect the affidavits are like pleadings. Other corroborative evidence, no doubt, is admissible for the United States, but the original allegations must in the end be supported. Hence, if those allegations on their fact be inadequate, the warrant can by no possibility be legal'."

Further, in *United States v. 63,250 Gallons of Beer, 1.1 F. 2d 242*, it is stated that the validity of a search warrant is determined at time of issuance, to-wit:

> "The validity of the warrant can never depend upon the manner of its execution. It must be valid when issued."

It is established that where opportunity did not exist or Petitioner was not aware of the issuance of the search warrant prior to trial. Petitioner may object to the testimony at time of trial, which Petitioner in this cause did as shown in the record. (Tr. 258.)

In application of *Fried, et al., 68 Fed. Sup. 961*, it is provided as follows:

> "The Federal Rules of Criminal Procedure prescribe that a motion for the return and suppression of anything obtained by an unlawful search and seizure should be made before trial or hearing, unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion. The court, by that rule, retains discretion to entertain the motion at the trial hearing. Rule 41E."

It has further been held, in *United States v. Atkinson, 56 Sup. Ct. 391, 392*, and *Banks v. United States, 223 F. 2d 884, 889*, as follows:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception had been taken, if the errors were obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

With Petitioner owning one-half of the real estate and house searched, the lease agreement being in default thus entitling Petitioner to immediate possession of the premises, and with said Petitioner holding a lien on the property of the lessee which was seized under the illegal search warrant, Petitioner Wyman Hulan Parr is an aggrieved person within Rule 41E and is entitled to assert the illegal search and seizure and to have the evidence offered against him suppressed and his conviction reversed. Petitioner holds a lien as a landlord under *Article 5238, V. A. C. S. Texas Civil Statutes*, which reads in part as follows:

> "All persons leasing or renting any residence, store house or other building, shall have a preference lien upon all property of the tenant or of any subtenant of such tenant in such residence, store house or other building, for the payment of rents due or to become due. * * *."

The following cases illustrate that to be an aggrieved party under an illegal search and seizure the possessory or proprietory interest need be only cursory, towit: *Hobson v. U. S. A., 226 F. 2d 890; Schwimmer v. U. S. A.,*

232 F. 2d 855, Cert. Den., 352 U. S. 833; U. S. A. v. Fowler, 17 F. R. D. 499; U. S. A. v. Ong Goon Sing, 149 F. S. 267.

In *United States v. Janitz, 6 F. R. D. 1, App. Dism., 161 F. 2d 19*, the said trial court construed Rule 41E to not require a possessory or proprietary interest of any nature in order to be an aggrieved person entitled to assert the violation of Amendment Four to the Constitution of the United States and Rule 41E of the Federal Rules of Criminal Procedure. This court points out the fact that the Supreme Court of the United States has not interpreted this Rule since its enactment. Said opinion provides in part as follows:

> "Prior to the adoption of this Rule, the law was firmly established in this Circuit to the effect that one could not complain of an unlawful search and seizure unless he had a proprietary interest in the property wrongfully seized. Mabee v. United States, 60 F. 2d 209; United States v. White, 322 U. S. 694. The remaining defendants in the instant case had no proprietary interest whatever in the property and under the law, as it was prior to the new Rule, they could not be heard to complain. While the United States Supreme Court 'has never been called upon to decide the point, the Federal courts in numerous cases, and with unimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction into evidence of that which was seized.' Goldstein v. United States, 316 U. S. 114. This was the view prior to the Congressional enactment of Rule 41 which places the Rule in the sphere of legislation transcending a mere rule of court.
>
> "This Court cannot harmonize the above opinion with the provisions of the Rule that such evidence cannot be used at any hearing or trial. To do so would

> cause the Court to enter the legislative field. The rule of construction is that language of this type shall be given its usual and generally accepted meaning. Whether or not the words in question vest any right in anyone to complain is beside the point. The rule must be construed as a restriction on the power of the Court to permit the introduction of such tainted evidence. And, if prior to or in the course of a trial, the issue is raised, the Court must follow the Act of Congress. Indeed, it would seem to be the duty of the Court itself to raise it. Nor is this altogether undesirable since if the Government, through its agents and without jurisdiction, carried away or seized property unlawfully, it cannot be and ought not to be permitted in justice or sound reason to gain any advantage whatever from such illegal conduct. The motion to suppress as to the remaining defendants is granted."

Since Rule 41E has been written, it is submitted to the Court that any person aggrieved is entitled to assert this defense regardless of proprietary or possessory rights, but regardless of this fact, the default in the lease clearly gave the Petitioner immediate right to possession of the premises, he was one-half owner of the real estate, and held a lien on all of the film and other goods, wares and merchandise seized by the Federal agents which were offered into evidence to convict this Petitioner contrary to Amendment 4 to the Constitution of the United States.

2. Can the conviction of Petitioner be upheld when the Respondent was allowed to exhibit to the jury lewd and obscene films over the objection of Petitioner, when Petitioner offered to stipulate the same were lewd and obscene, when the effect of said film deprived Petitioner of

a fair and impartial trial and due process of law as guaranteed him by the Constitution of the United States, Amendments 5 and 14 thereof?

The motion picture film which the government showed to the jury contained acts of sodomy, sexual intercourse, nudeness and other acts and exposures of such vile, reprehensible and despicable nature as to immediately prejudice the jury in this cause and to make it impossible for said jury to fairly and impartially weigh the evidence and determine the innocence or guilt of this Petitioner.

It is well established in law that photographs which are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or to divert the minds of the jury to prejudicial matters, should be excluded.

From the record in this cause, it is clear that it was not a matter of defense that the film which the government exhibited to the jury were not lewd and obscene as required by the statute, *Title 18, U. S. C., Section 1465.* It is further clear that Petitioner's counsel agreed to make this stipulation and did state in front of the court and jury that not only was it not a matter of defense but that a stipulation that the said movie films were lewd and obscene would be made for the record. Despite these offers by Petitioner's counsel and over the objection of Petitioner's counsel that the same would be prejudicial to the jury, the court allowed the moving pictures to be shown and exhibited to the jury. (Tr. 260-262.)

These movie films, "Call Girl," "Bubbles," and "Bachelor's Dream," Exhibits 4, 4A and 3, respectively, are before this court as original exhibits, and it is submitted to this court that even the briefest showing of any one or more of these exhibits to the court will quickly and clearly substantiate the Petitioner's position that the showing of these films will and did prejudice the jury so that its ability to reason and render a fair and impartial verdict based upon the evidence beyond a reasonable doubt is and was impossible.

22 Cor. Jur., Evidence, Section 1115, page 914, provides in part as follows:

> "Photographs should be excluded where they would confuse rather than aid the jury, distract the jury's attention from the main issues, or unduly emphasize the claims or the evidence of one of the parties, or where the natural effect of their introduction in evidence would be to arouse the sympathies or prejudices of the jury, rather than to throw any real light upon the issues."

5 Cor. Jur. Sec., Appeal in Error, Section 1724, page 964, reads in part as follows:

> "Error in the admission of evidence which apparently affected the jury in their verdict is prejudicial and is ground for reversal, and this rule has been applied, among other instances, to evidence objected to as not the best evidence, or as to extra judicial statements and declarations, or to demonstrative evidence, or to documentary evidence, * * *."

32 Cor. Jur. Sec., Evidence, Section 709, pages 612 and 613, provides in part as follows:

> "Photographs should be excluded where * * * natural effect of their introduction in evidence would be

> to arouse the sympathies or prejudices of the jury, rather than throw any real light on the issues. * * * A motion picture film is but a series of still photographs, and its introduction and exhibition in evidence may be permitted under the same basic principles as govern the admissibility of still photographs."

20 Am. Jur., Section 729, page 609, provides in part as follows:

> "Photographs that are calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions."

See also the following State authorities: *47 Lawyers' Report Annotated, 693; Gilbert v. West End Street Railway Company, 36 N. E. 60; Harris v. Quincy, 50 N. E. 1042; Fore v. State, 23 So. 710; Dobson v. Philadelphia, 7 Pa. Dist. R. 321; Wooley v. State, 285 S. W. 2d 218; Shaver v. State, 280 S. W. 2d 740; McClellan v. State, 40 S. W. 2d 87; Avirett v. State, 84 S. W. 2d 482; Ludwig v. State, 210 S. W. 2d 589; 83 A. L. R. 1319;* and *Southern Transport Company v. Adams, 141 S. W. 2d 739, 744.*

The only basis for admission of these motion pictures into evidence was to show their lewdness and obscenity. With Petitioner agreeing to make the stipulation for the record and before the jury, there would not be any substantial necessity for the showing of the film other than for the sole purpose of prejudicing the jury and thus denying unto this Petitioner a fair and impartial trial as guar-

anteed to him by the laws of the United States and the Constitution of the United States.

As was said in the case of *Lindsey v. United States, Ninth Circuit, 237 F. 2d 893, 898:*

> "Since we cannot say that guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts Bollenbach v. United States, 1946, 326 U. S. 607, 614, 66 S. Ct. 402, 406, 90 L. Ed. 350, we cannot say that the accused was accorded due process of law; and the error in receiving the recording of the sodium-pentothal interview must be held sufficiently prejudicial to entitled appellant to another trial. See Cf. Lutwak v. United States, 1953, 344 U. S. 604, 619; 73 S. Ct. 481, 97 L. Ed. 593; Smith v. United States, Ninth Cir., 1949, 173 Fed. 2d 181, 186."

And with Petitioner Wyman Hulan Parr being denied a fair and impartial trial by a jury which was prejudiced and made indignant by the showing of these films, said Petitioner has been refused a trial as guaranteed to him by the federal courts and the Constitution of the United States, thus this cause should be reversed.

3. Where Petitioner was indicted solely under the conspiracy statute of the United States, Title 18, U. S. C., Section 371, and the court charges on the law of principal over objection of Petitioner, does said charge not give the jury a means of convicting the Petitioner of an offense for which he was not indicted, contrary to Amendment 5 to the Constitution of the United States?

The instruction on the law of principals in the court's charge gave to the jury a means of convicting the Peti-

tioner for an offense for which he was not indicted, and from the evidence which was offered in this cause, the jury could well have found that the Petitioner was an aider or an abetter and convicted him on this basis without ever having found the essential elements to constitute a conspiracy.

The fact that there is a difference between the substantive offense and the offense of conspiracy has been clearly held in a number of cases, particularly the case of *Young v. United States, Fifth Circuit, 48 F. 2d 26.*

The case of *Dickerson v. United States, 18 F. 2d 887,* clearly illustrates the Petitioner's contention herein that the Government in this cause was required to prove more than aiding and abetting in the substantive offense to convict him of conspiracy and thus the court's charging on the law of principals made it possible for the jury to convict him without having to find the elements of conspiracy which are, and go beyond, the substantative offense, the court's opinion reading as follows:

> "To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either expressed or implied, and participation with knowledge of the agreement."

In *Thompson v. Johnson, 94 F. 2d 355,* the petitioner was an inmate of a federal penitentiary making applica-

tion for a Writ of Habeas Corpus on the basis that he had been convicted of the substantive offense as well as a conspiracy to commit the substantive offense and that since the conspiracy resulted in the substantive offense, he was only chargeable and subject to conviction of the substantive offense. The court overruled this contention as follows:

> "We need but quote one sentence from Parmagini v. United States, 42 F. 2d 721, 725: 'The last count of conspiracy to violate these laws is a separate and distinct offense punishable as such'."

In the case of *Tinsley v. United States, 43 F. 2d 890*, the court recognized the difference between a conspiracy count and a substantive offense when it held that an acquittal on a conspiracy does not prevent conviction on a substantive offense, said opinion reading in part as follows:

> "An acquittal on a conspiracy count does not prevent prosecution or conviction on the other seven counts, each of which charges a substantive offense. Bell v. United States, 2 F. 2d 543."

Thus, in this cause, with the co-conspirator, George R. Bly, being charged with the substantive offense in Counts 3, 4 and 5 of the indictment, and said indictment having been read to the jury, and the jury being required to find on the substantive counts as to Bly (Tr. 400), it is quite apparent that the instruction of the court on the law of principals was erroneous and harmful to this Petitioner as he could have been convicted as a principal without ever having been indicted therefor, as is required by law, *5 C. J. S., Section 1763, page 1163.*

STATEMENT

Petitioner, Wyman Hulan Parr, was indicted by a Grand Jury under the conspiracy statute of the United States, *Title 18, U. S. C., Section 371*, as conspiring to knowingly transport and cause to be transported in interstate commerce lewd and obscene motion picture films in violation of *Title 18, U. S. C., Section 1465*. During the course of the trial, after Petitioner had entered his plea of not guilty, the following excerpts are illustrative of the proceedings had and of Petitioner's objections thereto, to-wit:

The search warrant obtained by the government in this cause and the affidavit for same are set forth in the Transcript of Record, pages 180 through 188. It was not known by the Petitioner that a search warrant had been secured by the government until it was offered into evidence on the second day of this trial. When the Government sought to offer into evidence the search warrant, Exhibit 1, and the film and other items seized under the search warrant, Petitioner's counsel sought to make his objections thereto as follows (Tr. 258):

> "THE COURT: Proceed, gentlemen.
>
> "MR. HAMILTON: Your Honor, at this time the government desires to formally offer in evidence government's exhibit 1, which was a search warrant, and government's exhibits 2 and 2A which are the negatives, and government's exhibits 2 and 2B, which are the four loose metal containers containing master negatives, government's exhibit 3 which is the envelope containing three rolls of film, 'Inspiration,' 'Bachelor's Dream,' and 'Census Taker,' which the government alleges was traced all the way from New Mexico,

and government's exhibits 4 and 4A, which are the films 'Call Girl' and 'Bubbles,' which were traced from St. Louis. Government's exhibits 5, 5A and 5B, which are 'Baby Sitter,' 'Census Taker,' and 'Kinsey Report' which came down here from St. Louis with the agent today, and government's exhibits 6, 6A, B and C, which are the exhibits that the expert, Mr. Shaneyfelt, brought down. And there may be some additional ones.

"Q. (By Mr. Hamilton) Can you recall how many there were?

"A. I believe seven.

"Q. How many have you there?

"A. Seven.

"MR. HAMILTON: That will go through D, E and F.

"MR. KELSOE: We only accounted for five to the jury. I object to these matters that are being offered into evidence, in regard to the search warrant. * * *.

"THE COURT: It is not necessary for you to state you bill in the nature of an argument; you can take your exception.

"MR. KELSOE: Is it sufficient, I object to all of these matters going into evidence?

"THE COURT: Yes, and I overrule it.

"MR. KELSOE: The court does not desire to hear my reasons?

"THE COURT: No, we do not do that.

"MR. KELSOE: In other words, my record will be protected if I do not state my reason?

"THE COURT: Yes, that is right."

From a reading of the above, it is clear that Petitioner's counsel had started to state an objection to the search warrant but was interrupted by the court, stating that it was not necessary to state the nature of the objection and that the record would be protected. Although *Rule 41* of the *Rules of Criminal Procedure* provides that motion to suppress evidence under an illegal search warrant should be made before trial, the rule further recognized that such objection may be interposed at time of trial where the search warrant was not known of until that time. Counsel for Petitioner was seeking to call to the court's attention the fact that the search warrant was insufficient and invalid as a matter of law and thus the evidence offered thereunder was inadmissible.

On page 260 of the Transcript of Record, the government stated that it wishes to show Exhibit 4, a movie film entitled "Call Girl," in its entirety and portions of one or two others. Upon this happening, counsel for Petitioner made the following statement to the Court:

> "KELSOE: Now, if your honor please, in regard to the showing of the films in evidence, it is not a matter of defense that these films are not lewd and obscene, and we are willing to stipulate for the purpose of the record, and we submit that the showing of the pictures, in view of this stipulation, can be nothing more than to prejudice the jury, and we ask the court not to permit the same to be shown, so, we do object to the offering of the exhibits into evidence, and the court stated it was not necessary for us to state our reasons. If the court would like to hear our

reasons why it is not admissible, I will be glad to state them; if not, I would like to be protected in the record."

The court thereupon overruled the objection and permitted the District Attorney to show the pictures which were government's exhibits 4, 4A and 3, said exhibits being entitled "Call Girl," "Bubbles," and "Bachelor's Dream." (Tr. 260-262.)

The court in its charge (Tr. 378) gave a charge to the jury on the law of principals, such charge reading as follows:

"I charge you the law of principals involved. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, councils, commands, induced or prescribes the commission of such offense is a principal. Under the federal law administered in this court, anyone aiding or abetting in the commission of an offense is a principal."

To this charge the Petitioner excepted. (Tr. 382.)

It is undisputed from this record and from the indictment as shown in this Transcript of Record (Tr. 4-10) that the Petitioner was never charged or indicted with a substantive offense or as a principal to a substantive offense, but rather the sole and only charges against this Petitioner are embodied in Counts 1 and 2 of the indictment and both pertain solely and strictly to conspiracy.

Petitioner was convicted on Counts 1 and 2 of the indictment, each of which charged conspiracy and not a substan-

tive offense, and the Court sentenced Petitioner to seven years in the penitentiary (four years on Count 1 and three years on Count 2, the same to run consecutively).

CONCLUSION

With the individual's rights being more and more impaired through police authority, the Constitution of the United States remains the last vestige of protection for the citizen and thus a citizen who is vested with the proprietary rights of the Petitioner, Wyman Hulan Parr, most certainly should be an aggrieved person of an unlawful search and seizure contrary to Amendment Four of the Constitution of the United States and Rule 41E of the Federal Rules of Criminal Procedure and should be entitled to assert this defense of illegal search and seizure and when the evidence which has been offered to convict him is of such a prejudicial nature and the same was not material or substantive to the proof of the offense, our federal court system has deprived Petitioner of a fair and impartial trial to which he is justly entitled by our Constitution. Further, to permit the trial court to charge on the law of principal so as to give unto the jury a means of convicting Petitioner for an offense for which he was never charged or indicted contrary to the Constitution of the United States, Amendments 5 and 14 thereof, said Constitution and the due process of law of this citizen have been violated and impaired.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

G. H. KELSOE, JR.,
858 Mercantile Dallas Bldg.,
Dallas, Texas,
Counsel for Petitioner.

APPENDIX A

JUDGMENT

Extract from the Minutes of May 12, 1958

No. 16697

WYMAN HULAN PARR,

versus

UNITED STATES OF AMERICA,

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16697

WYMAN HULAN PARR,

Appellant,

versus

UNITED STATES OF AMERICA.

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(May 12, 1958.)

Before HUTCHESON, Chief Judge, and JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: This appeal is from a conviction of conspiring to transport in interstate commerce lewd and obscene motion picture film. 18 U.S.C.A. § 371, 18 U.S.C.A. § 1465. There are a number of specifications of error.

The Government was permitted to exhibit to the jury some of the film over the appellant's objection and offer to stipulate that the film was lewd and obscene. This, the

appellant says, would tend to arouse the sympathies and prejudices of the jury, so that the admission of the evidence was an error prejudicing his right to a fair and impartial trial. The admission would, to be sure, relieve the Government of its burden of proving the lewd and obscene character of the film. But it does not necessarily follow that the film should have been excluded from the view of the jury. It is a general rule that "A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact." 31 C.J.S. 1068, Evidence § 299. The reason for the rule is to permit a party "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." *Dunning v. Maine Central Railroad Co.*, 91 Me. 87, 39 A. 352, 64 Am.St.Rep. 208. Such rule, we think, should apply in a case such as this where the pictures offered in evidence are of the gist of the offense charged rather than discriptive or illustrative of a scene or an occurrence. Had the question of admissibility been one for the trial court's discretion we would say the discretion had not been abused. See IX Wigmore on Evidence, 3d Ed., p. 589, § 2591.

The appellant made an additional objection to the admission of the films in evidence on the ground that the identification of them was inadequate. It is unnecessary to set forth and analyze the testimony of the several witnesses by which the various films were traced and the ap-

pellant identified with them. The testimony was sufficient to identify the films and there was no error in the admission of them.

A number of the films introduced in evidence by the Government were found by F.B.I. Agents at a rural cabin. This cabin was purchased by the appellant and James Ray Williams. Title was in the name of Williams. Prior to the search of the premises it had been leased to George Robert Bly who took possession of it. A search warrant was procured based on information obtained by Federal officers from Bly. Williams accompanied the officers to the cabin and unlocked it for them. The appellant objected to the admission of the exhibits seized at the cabin on the ground that the search warrant was invalid. In his testimony the appellant stated that the cabin had been turned over to Bly and that appellant had not been up to the cabin. The appellant asserted that the film and photographic equipment in the cabin belonged to Bly. Although the appellant was the owner of a half interest in the property, it had been leased and he did not have possession or the right to possession at the time of the search. Under such circumstances he had no right to complain of a search of the premises. *Hardwig v. United States*, 6th Cir. 1928, 23 F. 2d 922. And where one without possession or a right of possession disclaims any interest in the articles seized he cannot complain of the unlawfulness of the seizure. *Lovette v. United States*, 5th Cir. 1956, 230 F. 2d 263. Since the appellant is not in a position to challenge the search and seizure, we need not consider whether the search was valid nor are we recuired

to determine whether the appellant was relieved of the necessity of filing a pre-trial motion to suppress.

The Court gave a rather lengthy charge to the jury but no longer than the nature of the case required. After reciting the substance of the indictment, the Court gave instructions upon the law. About midway in these instructions and following a statement as to the elements of conspiracy, the Court stated:

> "I charge you on the law of principals involved. Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces or procures the commission of such offense is a principal. Under the federal law administered in this court, any one aiding and abetting in the commission of an offense is a principal."

This was introductory to the Court's instruction stating that an aider or abettor was an accomplice and outlining the care with which accomplice testimony should be weighed. When the exception to the charge was made the court commented "I am half inclined to agree with you but since we are to charge on accomplices they will better understand the one if the other is given." We think the instruction on the law of principals did not have any application to the case. But the charge of the court must be considered as a whole. *Clark v. United States*, 5th Cir. 1934, 69 F. 2d 258. The appellant urges that this instruction would authorize the jury to convict the appellant of being an aider and abettor, an offense with which he was not charged. We cannot adopt this view. We think, as did the

trial court, that the language of which complaint was made is to be regarded as a part of the cautionary charge relating to accomplice testimony. Considering the entire charge we do not find any harmful error. See *McNeil v. United States*, D.C.Cir. 1936, 85 F. 2d 698.

Error is assigned in the refusal of the court to give some of the appellant's requested charges. The court instructed the jury that,

> "The indictment is a charge or accusation which in itself is not proof of the things therein alleged, but undertakes to set forth the things which the government charges the defendant with having done and which the government undertakes to prove."

The court gave a full instruction as to the burden of proof resting upon the government to establish the charges in the indictment beyond a reasonable doubt. The appellant suggests that the jury would infer that the court's instruction indicates that the indictment can be used as evidence if some other evidence is offered to go with it. We think the charge as given is not susceptible to the meaning which the appellant would ascribe to it. There was no error. There is no reason to suppose that the jury believed it could treat the indictment as anything more than the "charge or accusation" as stated in the court's instruction. See *United States v. Martin*, 2nd Cir. 1955, 223 F. 2d 666.

The appellant requested the court to give, and asserts that it was reversible error to refuse to give, the following instruction:

> "The indictment in this cause is not evidence, it is the charges which the Government must establish by

> proof to the satisfaction of the jury beyond a reasonable doubt. And until you believe the Government has so established its case, the defendant is entitled to be acquitted."

The court charged that the jury was the sole judge of the facts, that it must weigh the evidence, ascertain where the truth lies, and draw inferences from the evidence and only from the evidence. The court charged that the jury exercised the exclusive function of passing upon the credibility of witnesses. The charge given adequately stated the law and there was no error in refusing to give the requested charge. *Ehrlich v. United States*, 5th Cir. 1956, 238 F. 2d 481.

Error is specified in the refusal of the court to charge:

> "If, during the trial, from any ruling or other circumstances that has come to your attention, you may have any idea or have reached any conclusion as to what the court thinks about the case, do not be influenced thereby, but base your verdict entirely upon the evidence in the light of the law as given you in this charge, because you and only you are the judges of the fact."

Our review of the record does not disclose any ruling or statement of the court which could be regarded as an expression of "what the court thinks." We find nothing in the record of the trial requiring the requested instruction to be given.

The court charged that a criminal conspiracy has its origin in an atmosphere of secrecy as contrasted with the forms of agreement that we habitually use in civil life; that it is an informal understanding or undertaking of two

or more persons; and that conspiracy implies concerted design. The appellant had requested, and asserts error because the court declined to give, the following instructions:

> "Conspiracy is essentially a crime of intent and to establish criminal conspiracy, corrupt motive or intent must be shown. The mere knowledge, acquiescence or approval of an act without an agreement to cooperate or cooperation of such a nature as not to infer an agreement to participate in a conspiracy, is not enough to constitute a party as a member of the conspiracy."

The language as used by the court to state the nature of conspiracy may be somewhat lacking in unity and precision but is adequate. See *Duke v. United States*, 5th Cir. 1956, 233 F. 2d 897. The instruction given is subject to less criticism than could with propriety be directed to the appellant's proposal.

The court's instructions included the following:

> "In order for an act to constitute an overt act within the meaning of the indictment it must be some act taken subsequent to the formation of the conspiracy and must be done with an evil intent and fraudulent purpose, and such an act as was intended by the actor to help in accomplishing the purpose of the conspiracy, if any, and must be such an act as is reasonably calculated to accomplish or aid in accomplishing the alleged conspiracy."

The appellant complains because the court did not give this requested charge:

> "The fact that each of the several defendants may have acted illegally or maliciously with the same end

> in view will not establish conspiracy unless it appears that such acts were done pursuant to a mutual agreement."

A defendant is not entitled to select the phrases by which the law of the case shall be given to the jury. In comparing the last quoted instruction given with the one requested, it would appear that the instruction given was as favorable, perhaps more so, than the one requested. The refusal to give it was not error.

The instructions given included this charge:

> "You have noted from the indictment that the government has set forth some overt acts in support of each count of the charge of conspiracy. Now, if you find and believe from the evidence, beyond a reasonable doubt, that the defendants named in the indictment formed the conspiracy alleged and charged, then it is not necessary for the Government to prove all of the overt acts, but if the government proves one of them after the conspiracy is formed it will be sufficient to support a conviction."

No objection was made to the foregoing. The appellant made a request for the following charge:

> "Proof of overt acts alone will not warrant a conviction for conspiracy because in order to convict for a conspiracy, there must be competent proof beyond a reasonable doubt of an unlawful agreement between the parties and then the performance of an overt act."

In view of the charge given it was not error to refuse to give the one which was requested.

The statute making illegal the interstate transportation of obscene film became effective June 28, 1955. Evidence was admitted of acts of the appellants and others prior to

that date with respect to obscene film. In connection with this phase of the case the jury was instructed:

> "Now, in the taking of the evidence in this case some transactions that are in evidence refer back several years. The indictment does not cover those cases, and we will give you a charge on that:
>
> "You are instructed that you cannot convict the defendant on evidence concerning a conspiracy, if any, to transport lewd or obscene film in interstate commerce existing prior to June 28, 1955.
>
> "Now, there was evidence admitted here that such transportation was probably going on before June 28, 1955, but that was not to support a conviction under the indictment, but to show a system, if it does, that came on up to the 28th of June, 1955. In other words, if the defendant was engaged in systematically doing something beyond a certain date, the fact that he did it before that date may be shown as part of the system of the operation."

The appellant requested the court to charge:

> "You are instructed that the laws of the United States are not ex post facto laws but only operate in the future from their effective date and thus no law can be applied retroactively in this cause.
>
> "You are instruction that in order to convict the defendant in this cause, your decision must be based on competent evidence beyond a reasonable doubt occuring after June 28, 1955."

So much as was proper in the requested charges was included in the charges which were given.

Although the several objections of the appellant to different portions of the Court's charge have been examined, the objections in the aggregate might, we think, have been

disposed of with the observation that the charge as a whole fully and fairly presented the issues. Even though any of the objections had been well taken from a technical viewpoint there would have been no reversible error as no prejudice was or could have been shown. See *Patterson v. U. S.*, 5th Cir. 1951, 192 F. 2d 631.

The Government offered and the Court admitted evidence of the making of some of the film and of other related conduct of Parr or his associates during a period before June 28, 1955, the effective date of the prohibitive statute. This, the appellant contends, was prejudicial error requiring a reversal of his conviction. This view is not sound. It may be shown that a confederation existed and that activity took place pursuant to it during a period before these became illegal. This may be done for the purpose of showing the beginnings of the joint enterprise which later became unlawful. It is permissible to show that a conspiracy had its origin at a time before it became unlawful. *Bryant v. United States*, 5th Cir. 1919, 257 F. 378; *United States v. Randall*, 2nd Cir. 1944, 140 F. 2d 70. And see *Christianson v. United States*, 8th Cir. 1955, 226 F. 2d 646, cert. den. 350 U.S. 994, 76 S. Ct. 543, 100 L.Ed. 859, where the question was squarely presented.

Nor is it error, as appellant insists, for the trial court to admit evidence of conduct of the appellant and his co-conspirators prior to the date laid in the indictment. Such activities for a period reasonably proximate may shed light upon and tend to establish the conspiracy. It is sufficient if the conspiracy is proved to have existed prior to the com-

mission of the overt act or acts charged. *Bradford v. United States*, 5th Cir. 1907, 152 F. 617, cert. den. 206 U.S. 563, 27 S. Ct. 795, 51 L. Ed. 1190; *Pearlman v. United States*, 9th Cir. 1927, 20 F. 2d 113, cert. den. 275 U.S. 549, 48 S. Ct. 85, 72 L. Ed. 419; *Hood v. United States*, 8th Cir. 1927, 23 F. 2d 472, cert. den. 277 U.S. 588, 48 S. Ct. 436, 72 L. Ed. 1002; *United States v. Witt*, 2nd Cir. 1954, 215 F. 2d 580, cert. den. 348 U. S. 887, 75 S. Ct. 207, 99 L. Ed. 697.

George Robert Bly was a joint defendant with the appellant Parr in the first count of the indictment. He entered a plea of guilty to this count and to three counts charging offenses of interstate transportation of obscene and lewd film. Bly testified as a witness for the Government on the trial of appellant. The court recessed while Bly was being cross-examined by counsel for appellant. On being recalled the cross-examination continued. The records shows that the following transpired:

"Q. [By counsel for appellant] Mr. Bly, you have been charged in the indictment here with an act of conspiracy with Wyman Parr, had you not?

"A. Yes.

"Q. And isn't it a fact that you haven't plead guilty to that particular count of the indictment?

"A. No, sir.

"Q. That is not true?

"A. No, sir, I have not plead guilty to that particular count.

"Q. Then the reason you haven't plead guilty to it is because you believe you are not guilty?

Upon this happening, the District Attorney, in the presence of the jury, made the following statement:

"Mr. HAMILTON [United States Attorney]: It was my opinion that he had plead guilty to the overt act (all counts in the indictment).

"THE COURT: The Court has entered a plea of guilty and the witness, as I understand, plead guilty to the charges in the indictment.

"MR. HAMILTON: That was my understanding.

"THE COURT: If he has not plead guilty, then I think we should grant a severance and try the case over.

"A. May I speak?

"MR. HAMILTON: Yes.

"MR. KELSOE [Counsel for appellant]: I think this is a matter you ought to talk about in private.

"MR. HAMILTON: It is my understanding that the witness plead guilty.

"THE COURT: That was the court's understanding.

"MR. HAMILTON: His attorney is present here; if he wants to discuss the matter.

"THE COURT: What is your view, as his attorney?

"MR. ALEXANDRIA [Attorney for witness Bly]: He has entered a plea of guilty on all counts and he waived his right to a trial with a jury and entered his plea before the court and my understanding was the court accepted the plea.

"THE COURT: He did plead guilty to all counts.

"MR. ALEXANDRIA: Yes, Your Honor.

"THE COURT: That is that Court's record on the matter. When did you make up your mind to testify you didn't plead guilty to all counts?

"A. If I may clarify myself: When it was brought out by counsel that I had plead guilty to this particular count, I was not aware that—I was aware that I had plead guilty to all counts—but I didn't know I was pleading guilty to each individual count. The conspiracy thing was the one in my mind, I plead guilty to all counts against me, yes, sir.

"THE COURT: You are an intelligent man, and you are represented by a capable lawyer, and you are guilty of contempt of this court.

"A. I am sorry, sir.

"THE COURT: You may examine him further, if you wish, before we enforce any penalties on him for contempt."

The cross-examination continued. No motion was made requesting that the court declare a mistrial. There was no request that the jury be requested to disregard the incident. The appellant here asserts that it was error for the court to conduct a contempt hearing against the witness Bly in the presence of the jury. Under this specification, we can hardly say in support of it, the appellant cites precedents holding it to be error for the court or prosecutor to bring before the jury the fact that another involved in the offense charged has entered a plea of guilty. *Payton v. United States*, D. C. Cir. 1955, 222 F. 2d 794; *United States v. Toner*, 3rd Cir. 1949, 173 F. 2d 140; *United States v. Hall*, 2nd Cir. 1950, 178 F. 2d 853. In the case before us, unlike the cases appellant cites, it was the appellant who had opened the question of the plea of Bly. We

think it was proper for court and prosecutor to keep straight the record of the plea of guilty which Bly had entered in the very case which was on trial. There can be no benefit to an appellant by reason of an error which his conduct induced or which he invited. I Wigmore on Evidence, 3d Ed. 344, § 18(D). It was then no error to show that Bly had entered a plea of guilty. The appellant could not have been hurt by a statement that Bly, the most important of the Government's witnesses, was in contempt.

Finally, the appellant contends the evidence is insufficient to support the conviction. We need not comment upon the evidence which was brought forward by the Government. It was sufficient to support the verdict of guilty.

No reversible error is shown. The judgment of the district court is

AFFIRMED.

(SEAL)

A true copy.
Test: EDWARD W. WADSWORTH
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

APPENDIX B

18 U. S. C., § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punshment provided for such misdemeanor.

18 U. S. C., § 1465:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five of

such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.